

ALLEN & OVERY

RECENT CHANGES REGARDING OCCUPATIONAL PENSIONS

Focus on self-employed company leaders

A recent act has made various changes to the legal framework of occupational pensions for employees and self-employed company leaders. The key changes were outlined in our eAlert of 30 June 2014.

In this eAlert, we explain one set of the changes in more detail, in particular the changes to occupational pension arrangements for self-employed company leaders.

Up until now, the legal framework for occupational pension arrangements of self-employed company leaders was very limited. The new act introduces a minimum legal framework for such arrangements. Some of the new rules protect the interests of the company leader whereas others introduce restrictions.

The key points of the new legal framework are summarised below and relate to the following areas:

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We briefly summarise the key changes below.

- **Self-employed company leaders** – A self-employed company leader is an individual who:
 - has a mandate as director, statutory manager (“*zaakvoerder*”), liquidator or other similar function; or
 - performs a leading function within the company or a position of day-to-day management or commercial, financial or technical management, outside the framework of an employment agreement.
- **Formal requirements** – Each occupational pension arrangement of a self-employed company leader must be set out in the (collective) pension plan rules or an individual pension agreement.

The plan rules or the individual pension agreement must contain certain mandatory information, such as the retirement age (ie the age from which the occupational retirement benefit is payable).

- **Externalisation obligation** – The management of the occupational pension arrangement must be performed by a pension institution, ie a pension fund or an insurer.
- **Accrued reserves and benefits** – The affiliated self-employed company leader is entitled to accrued reserves and accrued benefits according to the plan rules or the individual pension agreement. Unlike for employees, the law does not determine minimum levels of those accrued rights.

Also, the law does not prescribe the options that must be made available to the company leader in the event of an “exit” from the arrangement (unlike the position for employees). However, the law does refer to the company leader’s right, when he or she is no longer the company leader of the relevant company, to transfer his or her reserves to another pension institution managing occupational pension arrangements for self-employed company leaders (see also below).

- **Individual information obligation** – The company leader must receive, at least once a year, a pension statement containing specific information on his or her entitlements under the occupational pension arrangement. Content-wise, the statement contains the same information as the pension statement for employees.

Also, the self-employed company leader will have access to the DB2P database, and at age 45 will receive a letter in respect of his or her legal and occupational pension entitlements.

- **Transparency regarding management of pension arrangement** – As is the case in respect of occupational pension arrangements for employees, the pension institution must draft a statement of investment principles (so-called “SIP”) in respect of the occupational pension arrangements for self-employed company leaders.

Moreover, each year, the pension institution must draft a report on the management of the occupational pension arrangement.

A self-employed company leader may request a copy of the following documents:

- The statement of investment principles.
- The report on the management of the occupational pension arrangement.
- The annual accounts and annual report of the pension institution and, if applicable, those accounts and reports that correspond to the relevant occupational pension arrangement.
- If the affiliated company leader bears the investment risk, a document setting out all investment options as well as details of the actual investment portfolio, accompanied by a description of the risks and costs associated with the investments.
- **Early pay-out** – A self-employed company leader can only obtain a pay-out under an occupational pension arrangement upon his or her retirement or as from age 60, if the plan rules or the individual pension agreement expressly provide this option. This is the same rule as for employees.

The only exceptions to this rule are:

- the company leader’s right, when he or she is no longer the company leader of the relevant company, to transfer his or her reserves to another pension

institution managing occupational pension arrangements for self-employed company leaders; and

- the company leader's option to receive an advance payment of his or her occupational retirement benefit or to pledge his or her entitlements under the occupational pension arrangement with a view to purchasing, building or renovating real estate, if the plan rules or individual pension agreement provide for this option (see below).

- **Advance payments and pledge** – The plan rules or the individual pension agreement may allow the self-employed company leader to receive an advance payment of his or her occupational retirement benefit or to pledge his or her entitlements under the occupational pension arrangement with a view to purchasing, building or renovating real estate located within the European Economic Area, ie in one of the EU countries or Iceland, Liechtenstein or Norway.

Such advance payments and loans must be reimbursed as soon as the real estate is no longer in the company leader's estate.

If the plan rules or the individual pension agreement provide for any of these options, it must expressly state the conditions and limitations referred to above.

- **Limitation periods** – The new uniform regime on limitation periods, which provides a period of prescription of five years, also applies to any claims (either contractual claims or tort-based claims) of self-employed company leaders, affiliates or beneficiaries against the company and/or the pension institution (ie the insurer or the pension fund).

- **Jurisdiction of the labour courts** – As from 1 September 2014, all disputes related to occupational pension arrangements of self-employed company leaders must be handled by the labour tribunals and labour courts.

- **Supervision by the FSMA** – The FSMA is responsible for supervising compliance with the abovementioned rules.

The pension institutions (ie insurers and pension funds) must provide certain information to the FSMA about the occupational pension arrangements for self-employed company leaders that they manage. However, if a pension fund or insurer has already

provided the information to the Sigedis database, no additional reporting to the FSMA is required in respect of that data.

The FSMA has the same powers in terms of investigating compliance with the abovementioned rules and sanctioning breaches, as it has in respect of occupational pension arrangements for employees (eg the ability to (i) do on site investigations, (ii) impose a deadline for ensuring compliance, (iii) issue warnings, (iv) impose penalties and/or administrative fines; etc).

The FSMA must draft a bi-annual report on the occupational pension arrangements for self-employed company leaders.

- **Reporting obligation of actuaries and external auditors** – As is the case in respect of arrangements for employees, the appointed actuary and recognised external auditor have an obligation to report to the FSMA any breach of the abovementioned rules of which they become aware in the context of the performance of their tasks.

- **Criminal sanctions** – Pension institutions, organisers and their directors and agents may be subject to criminal sanctions (imprisonment and/or fines) if they:

- knowingly make incorrect statements to the FSMA or if they do not provide the requested data to the FSMA.

- do not comply with their obligations as set out above or if they participate in the execution of an occupational pension arrangement that is not compliant with the abovementioned rules.

- **Exceptions for certain existing arrangements** – The new rules as set out in this eAlert also apply to existing arrangements. However, they do not apply fully to certain occupational pension arrangements that were implemented before 2012. In particular, the following arrangements do not fall under the new rules:

- Individual pension arrangements for self-employed company leaders who hold a mandate as director, statutory manager (“*zaakvoerder*”), liquidator or a similar function, *to the extent of*:

- the lump sum insured under a company leader insurance arrangement entered into before 1 July 2012; and

- as regards the remainder, the amount of the internal provisions (ie book reserves) that existed at the end of the last financial year with an end date occurring prior to 1 January 2012, unless those provisions have been transferred to a pension institution.
- Individual pension arrangements for self-employed company leaders who perform a leading function within the company or a position of day-to-day management or commercial, financial or technical management, outside the framework of an employment agreement, and that already existed before 16 November 2003, *to the extent of*:
 - the lump sum insured under a company leader insurance arrangement entered into before 1 July 2012; and
 - as regards the remainder, the amount of the internal provisions (ie book reserves) that existed at the end of the last financial year with an end date prior to 1 January 2012, unless those provisions have been transferred to a pension institution.

In other words, these arrangements only partly fall under the new rules.

However, the restriction in respect of (i) early pay-out and (ii) advance payments and pledge, as set out above, does apply fully to the abovementioned existing arrangements.

We are happy to answer any questions that you may have on these changes and to assist you in reviewing your company's occupational pension arrangements.



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